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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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JUL 27 1994

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:

Petition for Rulemaking)
and Petition for Relief) RM 8491
in Section 214 Video Dialtone)
Application Process)

REPLY COMMENTS

The Center for Media Education, Consumer Federation of America, National Association for the Advancement of Colored People, National Council of La Raza, and the Office of Communication of the United Church of Christ, (collectively "Petitioners") submit the following in response to comments made by several Regional Bell Operation Companies ("RBOCs"), government, and non-profit commenters regarding our Petition for Rulemaking and Petition for Relief in the Section 214 Video Dialtone Application Process.

Petitioners note at the outset that the comments of the RBOCs have not quelled our concerns about the equitable provision of video dialtone service in any significant way. While claiming not to discriminate, they have failed to supply the census tract data needed to verify their claims.¹ Further, the wide range of opinions among commenters on such fundamental policy issues as

¹ All four of the RBOCs whose proposals were included in Dr. Mark Cooper's study filed comments in response to the Commission's Public Notice. None of the companies submitted the census tract data requested by the petitioners, nor did they compare their service areas to the city-wide data petitioners believe is relevant for determining whether their deployment is equitable. See Cooper Affidavit ¶ 3.

universal service, non-discrimination and the utility of § 214 process, in our view, underscores the need for the relief requested in the petitions. We therefore urge the Commission not to grant any more § 214 applications without fully considering whether the application is discriminatory.²

It is also clear from their comments that the RBOCs have misconstrued our intentions. Petitioners reiterate that we have presented the Commission with legal issues, and asked it to clarify its position in a policy statement and interpretive rule. The point of our petition for rulemaking is to reform the § 214 process such that an accurate analysis of the facts surrounding each application can be done, and to clarify Commission policy and procedures so that RBOCs are thoroughly apprised of their obligations under the Communications Act.

All of the Petitioners have been engaged in the debate of how best to protect the public interest in communication services for decades. We have consistently maintained that there are important policy questions surrounding the provision of video services by telephone companies -- whether consumers will have access to affordable basic telephone service, for example. Now that telephone companies have been given permission to provide video services, and to do so through the § 214 process, however,

² We note that the Commission recently granted the § 214 application of the New Jersey Bell Telephone Company for Dover Township, New Jersey. Order and Authorization, FCC 94-180 (adopted July 5, 1994). While we understand that the grant was conditioned on compliance with any prospective rules, we are disappointed that the order did not specifically address the issue of discrimination.

Petitioners have a new set of concerns which must be addressed by the Commission before video dialtone is implemented. The potential for RBOCs not to serve low-income and minority consumers, or to serve them last, is certainly one of those issues.³

The deployment of video dialtone could set a precedent for the provision of advanced technological services in the future. We must insure that new services are made available to all who need or want them, regardless of race, ethnicity or income level. While we do not seek to delay video dialtone deployment -- delay, if any -- will be worth it if we can guarantee that video dialtone will be rolled out to all Americans on an equitable basis.⁴

I. The Confusion Regarding Universal Service and Discrimination Demonstrates the Need for the Commission to Clarify Its Policy

Despite language in the Video Dialtone Order clearly

³ Nor have the Petitioners ignored this issue in the cable context, as GTE suggested. GTE at 10. The history of cable television deployment is one of our causes for concern regarding video dialtone. But as we pointed out in our petition, the 1984 Cable Act has an anti-redlining provision. See, The Cable Communications Policy Act of 1984, § 621(a)(3), 47 U.S.C. § 541 (1991). According to Ameritech, cable now passes 95% of homes, so it appears that redlining in the cable industry has been ameliorated. Ameritech at 7. Minority and low-income communities will not reap the benefits of competition between cable and video dialtone without a strong anti-redlining policy.

⁴ Petitioners do not believe they are harming their constituents by asking the Commission to state unequivocally that those applying to provide video dialtone services must do so in accordance with the law. See BA at 2, 6; PB at 12. In fact, many of the people the petitioners seek to protect, namely the poor and minorities may go unserved unless the Commission adopts adequate regulatory safeguards.

confirming the Commission's commitment to universal video dialtone service,⁵ the responses of the RBOCs on this issue range from outright denials that any such obligation exists to suggestions that the issue be dealt with in a more "comprehensive" proceeding. And while all of the RBOCs agree that video dialtone should be provided in a non-discriminatory manner, their statements show that their primary concern is the profit-making potential of the service.⁶ They have simply failed to demonstrate that their marketing decisions will not unfairly exclude minority and low-income communities.

A. The FCC Should Explicitly Reaffirm Its Commitment to the Goal of Universal Video Dialtone Service

There is no real consensus among the RBOCs on the issue of universal service. Bell Atlantic, for example, concedes that "petitioners are correct in their concern that the deployment of new technology raises issues as to the appropriate level of service subject to universal service requirements." BA at 6. At the same time, Southwestern Bell maintains that "there is not any universal service issue to be addressed with respect to video dialtone." SWBT at 5. The diversity of positions among industry leaders demonstrates the need for the Commission to state unequivocally its universal service policy with regard to video dialtone.

⁵ 7 FCC Rcd at 5806.

⁶ For example, BellSouth states, "competitive pressures will not permit the provision of video dialtone in areas that will not produce the revenues to cover the cost of providing the service." BS at 3.

Several commenters suggest addressing the issue of universal service in a separate proceeding.⁷ Petitioners reject the notion that there is a need for a separate proceeding. This suggestion is just a tactic designed to hold up the relief we seek while the Commission grants § 214 applications. It is fairer to both the public and the § 214 applicants to set the ground rules for video dialtone now. The Commission should fashion the structural reform needed to make sure that the its staff can analyze each application to determine whether it is consistent with the public interest.

B. The Commission Should Clarify What Non-Discriminatory Service Entails

The RBOCs claim they are not engaging in redlining because we have shown no intent to discriminate. BA at 2; BS at 7. Petitioners have not, in fact, alleged that the companies are intentionally bypassing minority and low-income communities. See, Petitioners' Comments at 2. We have no basis to evaluate the companies' intentions because they have not adequately explained them.

As a matter of policy, the appropriate standard should be effect and not intent. In other contexts where redlining is traditionally a problem, namely in the insurance, banking and housing industries, Congress and the courts have found that discriminations occurs in this way. Companies not only discriminate by purposefully depriving minorities of service,

⁷ See e.g., BS at 6; SWBT at 2; BA at 6; Ameritech at 2.

they also discriminate by adopting standards that lead to statistical incidence of fewer minorities getting served. Thus, a practice can be discriminatory if it has the effect of excluding members of a protected class.⁸

Petitioners stress that the statistical evidence gathered by Dr. Mark Cooper and Anthony Pharr which shows a pattern of bypassing predominately minority and low-income communities raises serious concerns about the RBOCs discriminating in their initial deployment of video dialtone. Contrary to the claims of some commenters, see, e.g., BS at 7, such statistics are clearly relevant.⁹

⁸ The "effects test" or "disparate impact" theory of discrimination was first announced in two Supreme Court decision involving employment discrimination, Griggs v. Duke Power Company, 401 U.S. 424, 91 S.Ct. 849 (1971) and Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S.Ct. 2362 (1975), and was later codified by Congress in the Civil Rights Act of 1991. 42 U.S.C. § 2000e-2. See also, 1991 U.S.C.C.A.N. 561. The effects test is used in other discrimination and redlining contexts, including housing, Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926 (2d Cir. 1988) review declined in part and judgement aff'd, 488 U.S. 15, 16 (1988) (while the Supreme Court did not reach the question of whether a pure impact test was appropriate because the defendant had not challenged the application of that test, the Court did comment that it was "satisfied on this record that disparate impact was shown."); credit, Cherry v. Amoco Oil Company, 490 F.Supp. 1026 (N.D. Ga. 1980) (Plaintiffs may use the "effects test" to make a prima facie case that credit scoring system statistically excluded Blacks); and insurance, NAACP v. American Family Mutual, 978 F.2d 287 (1992).

⁹ BellSouth is wrong when it says that statistical evidence is irrelevant in testing compliance with the Commission's EEO requirements. See Implementation of Commission's Equal Employment Opportunity Rules, MM Docket Nol 94-34, FCC 94-103 (April 21, 1994) at ¶ 5 & n.6. BellSouth misreads Florida State Conference of Branches of the NAACP v. FCC, 24 F.3d 271 (1994), a case where the FCC conducted a further investigation because the licensee's employment profile showed that the station had failed to employ minorities within the "zone

The Commission should clarify what non-discriminatory service entails. Specifically, the Commission needs to clarify what data should be submitted and the standards for assessing that data. For example, what is the relevant geographic area for assessing discrimination? What level of disparity should trigger further inquiry? If the Commission fails to clarify its policy now, it is likely that a RBOC will offer service in a way that disproportionately denies service to minorities and low income persons in a manner that would be illegal if it were a bank or insurance provider. The Commission should not grant certificates of public convenience and necessity for proposals which have the effect of excluding a disproportionate number of minorities.

II. The Limited Data Filed by the RBOCs Demonstrate the Need for the Requested Relief

All RBOCs adamantly state that they are proposing to provide video dialtone in an equitable manner and to serve areas with diverse racial and income compositions. Yet few companies have provided any new data to substantiate these claims and refute Dr. Cooper's analysis. The RBOCs failure to provide anything more

of reasonableness." As a result of that investigation, the Commission imposed both a short term renewal and forfeiture. Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area, 5 FCC Rcd 4893, 4898 (1990). In affirming the FCC's action, the Court merely found that it was not irrational for the FCC to disregard NAACP's "statistical showing that the failure to hire any minorities out of 58 hiring opportunities could not have occurred by chance alone." 24 F.3d at _____. Indeed, the Court affirmed that "statistically disparity between the minority population and the station's employment profile was relevant in determining whether or not to hold a hearing." Id. Petitioners believe the broadcast standard quantifying the "zone of reasonableness" is too low to be meaningful in the video dialtone context.

than scant evidence on their own behalf suggests that they are reluctant to let the public and the Commission fully evaluate their proposals. Petitioners urge the Commission to adopt rules which require the applicants to submit, in a uniform manner, census tract level data which details the demographic composition of the areas they propose to serve.

Dr. Cooper's review of PacTel, Ameritech, and US West's new data confirms his previous conclusion that there is a consistent pattern of underserving minority and low-income areas. See Cooper affidavit at 3-4. As Petitioners have stated before, the RBOCs are using the frame of reference for their analysis that is most favorable to them. Dr. Cooper's analysis demonstrates that the "relevant social, economic, and governmental areas which should be the frame of reference for video dialtone are local areas." Cooper affidavit at 2. This difference of opinion between the Petitioners and the RBOCs calls for the Commission to clarify its policy.

III. The Relief Requested is Appropriate and Necessary to Reform the § 214 Process

Several RBOCs stated that the relief requested is not necessary since existing law prohibits discriminatory conduct. PB at 9, GTE at 6. However, some of their comments point out that the § 214 process, as it currently stands, is insufficient to guard against discriminatory practices. As SWBT explains, "historically, the focus of Section 214 has been on the demand for service, competitive impact and economic justification for new construction," and not on the equitable distribution of new

services. SWBT at 3. Instead of reforming the process along the lines that Petitioners suggest, the RBOCs suggest streamlining or even eliminating the process altogether. See, e.g., US West Opp. to RM (June 2, 1994) at 3; GTE at 8.¹⁰

What the RBOCs really seek is no regulatory review at all. Throughout these proceedings they have steadfastly opposed local franchising, and have blocked efforts to impose a video-dialtone specific regulatory framework. Instead, they sought to "shoehorn" video dialtone into the existing framework for regulation of common carriers under Title II, and now complain when members of the public attempt to hold them to § 214's requirement that they show that construction of the facilities serves the public convenience and necessity. Clearly, some form of regulation is required so that the public interest is served. Having chosen to use the § 214 process, it is incumbent upon the Commission to review applications a way that ensures public interest goals -- including nondiscrimination and universal service -- are met. Granting the relief requested by Petitioners would clarify how the § 214 process is to work, providing more certainty to the applicants and public alike.

¹⁰ GTE suggests that the Commission's tariff approval procedures provide an adequate substitute for section 214 oversight. This is clearly not the case. The two proceedings serve distinct functions. Moreover, reasonableness of tariffed rates can only be an issue where facilities are constructed. The issue that Petitioners are concerned about, i.e., that RBOCs are failing to construct facilities at all in areas with low income or a large proportion of minority residents, would not arise in a tariff review proceeding.

CONCLUSION


Petitioners believe the issues they have presented merit careful consideration by the Commission. Our goal is not to hold up the deployment of new telecommunications services. Rather, Petitioners simply want to make sure that companies who will benefit from offering video dialtone not do so to the detriment of minorities and low-income communities. We believe the threat of this happening is sufficient to warrant the relief we seek.

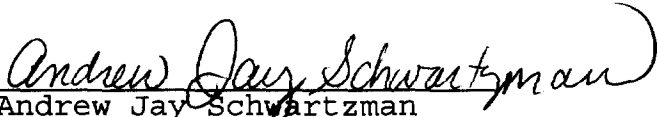
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July 27, 1994

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**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of:

Petition for Rulemaking)
and Petition for Relief) DA 94621
in Section 214 Video Dialtone)
Applications Process)

**AFFIDAVIT OF DR. MARK N. COOPER IN SUPPORT OF
THE REPLY COMMENTS OF THE
CENTER FOR MEDIA EDUCATION,
THE CONSUMER FEDERATION OF AMERICA,
THE UNITED CHURCH OF CHRIST
THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
NATIONAL COUNCIL OF LA RAZA**

I, Dr. Mark N. Cooper, first being duly sworn, hereby state that the following information is true and correct to the best of my knowledge, information and belief:

1. I am the same Mark Cooper who filed affidavits in support of the petitions and comments filed by the above groups. My initial analysis demonstrated a clear pattern in the initial video dialtone offerings of four of the Regional Bell Operating Companies (RBOCs) in which areas that are predominantly lower income and minority have not been provided video dialtone service. My second affidavit, attached to the initial comments of the Joint Petitioners in this Docket, demonstrated that US West's new data did not refute my initial analysis in any way.
2. It is obvious that the companies have the ability to provide systematic census tract data. They have refused to do so, instead providing a hodge podge of analyses. Each company chooses a level and type of analysis which it believes serves its purposes best, but none of them serve the public interest or a coherent public policy to promote universal service for video dialtone. By refusing to provide

detailed systematic data on census tracts, the companies simply hide the fact that their deployments are not representative of minority and low income groups. The comments presented by PacTel are a perfect example of this misleading analysis.

3. In its comments PacTel asserts that its initial deployment is representative of the state of California as a whole. The Joint Petitioners have repeatedly pointed out that discrimination cannot be measured on such a broad scale for a variety of reasons. Therefore, we reject the companies definitions of the relevant frame of reference.
4. First, such an approach would enable companies to avoid serving center cities, which are significantly minority, and rural areas, which are significantly non-minority, and claim to be representative because the two excluded areas average each other out.
5. Second, discrimination is invariably a much more local matter in other areas of social concern such as banking, mortgage lending, housing, and schooling.
6. In the telecommunications/video area, local calling areas, local cable areas, and local governments are much smaller than a statewide average. Thus, relevant social, economic and governmental areas which should be the frame of reference for video dialtone are small local, not state-wide areas.
7. Analytically, PacTel fails to provide detailed data on a census tract basis. Therefore a thorough analysis cannot be done. However, PacTel has provided enough data to prove the point about the proper frame of reference.
8. PacTel has given us the aggregate demographics of all the exchanges that will be served by video dialtone under the current §214 applications (PacTel at 8). It then compares the demographics of served areas to the statewide average. PacTel's claim of fairly representing all population groups evaporates when the proper, smaller units of analysis are used.
9. In Table 1 I create an index of representativeness. This is the ratio of the population subgroup percentage in the served area to the population subgroup percentage in the referent area. For example, PacTel claims that Whites make up 67.9% of the initial deployment areas but 66.7% of the state. Therefore, they are slightly overrepresented ($67.9/66.7=1.01$).
10. PacTel's statewide analysis constitutes the first line of Table 1. In addition to the White subgroup, PacTel claims Blacks represent 7.4% of the population in the initial deployment area and 7.7% in the state. Therefore, they are slightly underrepresented ($7.4/7.7=.95$). Asians are substantially overrepresented, with

a value of 1.31. American indians and others are substantially underrepresented with a value of .71. Hispanics are also clearly underrepresented, with a value of .85.

TABLE 1: INDEX OF REPRESENTATIVENESS

	<u>RATIO OF POPULATION IN SERVED TO REFERENT AREA</u>				
	WHITES	BLACKS	ASIANS	AMERICAN INDIANS& OTHERS	HISPANICS
DEPLOYMENT /STATE	1.01	.95	1.31	.71	.85
DEPLOYMENT /COUNTY	1.05	.90	1.30	.67	.73
DEPLOYMENT /CITY	1.13	.70	1.18	.60	.75

11. PacTel's analysis is misleading and the picture becomes worse and worse as I refine the area of comparison. For example, the second line of the Table 1 is based on the overall demographic make-up of only those counties in which as least one exchange is being served. Counties are closer to the calling area, a cable franchise area and a relevant unit of local government, frequently encompassing a school district.
12. At this level we discover that the initial deployment of video dialtone in all the counties which have at least one exchange served is less balanced. The underrepresentation of Blacks, American Indians and Others, and Hispanics is much greater when we consider the population of the specific counties being served. The index for Blacks declines from .95 to .90, for American Indians and other it declines for .71 to .67 and for Hispanics from .85 to .73.
13. The picture becomes even worse when one considers only specific cities which are being served. The third line of the Table is based on the overall demographic make-up of only those cities in which at least one exchange is being served. Cities are likely to be franchise areas for cable television and virtually certain to fall in one calling area. They are frequently a local school district. These estimates are based on a virtual one-to-one correlation between exchange names

and city names for almost all of the areas that PacTel has proposed to serve. The analysis also includes San Diego City and Los Angeles City.

14. If the analysis is taken to this level, we find a substantial increase in the estimation of the overrepresentation of Whites (1.05 to 1.13), a very sharp increase in the estimation of the underrepresentation of Blacks (.90 to .70), a substantial decrease in the overrepresentation of Asians (1.30 to 1.18) and a substantial increase in the underrepresentation of American Indians and others (.67 to .60).
15. Of course, this is not the most detailed level of analysis to which the analysis can move. For Metropolitan San Diego, we had looked at census tracts within cities. That analysis leads me to conclude that in terms of the index I have used in this analysis, the bottom line for Blacks and Hispanics could be in the range of .55 to .65. Unfortunately, PacTel has not provided census tract data, especially for Los Angeles, where it is simply impossible to identify specific areas which are being served, so that more detailed level of analysis is extremely difficult to conduct.
16. It should also be noted that the manner in which PacTel provided its partial data not only forces aggregate comparisons across all deployment areas, but also does not allow the ratio of population subgroups in served and unserved areas to be discussed. For example, in San Diego city I calculated the ratio of Blacks and Hispanics in unserved areas to be .46.
17. Thus, on a city-by-city basis, we find American Indians (.60), Blacks (.70) and Hispanics (.75) clearly underrepresented. Whites (1.13) and Asians (1.18) are overrepresented. Not surprisingly, this pattern of service delivered to specific groups appears to reflect economic status. For example, on a statewide basis, an index of median household income for these groups is presented in Table 2.

TABLE 2: INDEX OF HOUSEHOLD INCOME COMPARED TO
INDEX OF REPRESENTATIVENESS

GROUPS	RATIO OF STATE-WIDE GROUP MEDIAN INCOME TO OVERALL STATEWIDE MEDIAN INCOME
ASIA	1.11
WHITE	1.07
HISPANIC	.80
AMERICAN INDIAN	.77
BLACK	.73

18. Given the above analysis, it should be clear that the effort by Bell Atlantic and Ameritech to analyze the representativeness of their deployment across a multi-state area is totally unacceptable. It tells us nothing about the true availability of video dialtone to various ethnic and income groups at the relevant level of local telephone, cable TV, and government service.
19. Ameritech also identifies a very small number of predominantly minority and low income exchanges it will serve as proof that it is not discriminating. This list suggests quite the contrary, however. Ameritech identifies only four minority and low income exchanges -- one in Illinois, one in Wisconsin and two in Ohio. This presentation does nothing to refute the earlier analysis or to resolve the question of discrimination.
20. First, it has already been shown that in spite of the inclusion of Harvey Illinois in the initial deployment, the Chicago area deployment is not representative of the Chicago area.
21. Second, the initial affidavit analyzed Indianapolis. Ameritech had not identified any predominantly minority exchanges in that area, although there are certain to be several.
22. Third, no predominantly minority exchanges were identified as served in the Detroit area, where the entire center city is predominantly Black.
23. Fourth, the fact that Ameritech can find 4 predominantly minority exchanges that it proposes to serve out of over 70 included in its initial deployment is hardly a demonstration of a lack of discrimination. Can this possibly be representative, when Detroit itself is a predominantly minority city? Thus, Ameritech's suggestion that because they serve a very few predominantly minority exchanges proves nothing about the overall pattern of discrimination.
24. Bell Atlantic's service territory-wide demographic analysis is based on a large number of areas which it had not proposed to serve prior to the filing of the Joint Petitions. The deployment in these areas continues to raise concerns, however. In fact, questions have been raised about the failure to serve certain areas. A press account of the Philadelphia deployment noted the failure to serve downtown areas. ("Bell Maps Out Video Network, With One Big Hole. Early Plans Leave Out Center City. The Areas That Do Get The System Could Have Hundreds of TV Channels." Philadelphia Inquirer, June 17, 1994.)
25. Similar problems seem to plague the Baltimore application, as Table 3 shows. Because Bell Atlantic has failed to provide census tract data and the Baltimore map is difficult to match up with the census tract maps, my analysis is preliminary, but the pattern is clear. Blacks appear to be well represented in the suburbs, but significantly underrepresented in the deployment areas within the

center city.

**TABLE 3: PERCENTAGE OF BLACKS IN SERVED AND UNSERVED
PARTS OF BALTIMORE**

	SERVED	UNSERVED
METRO AREA	32.3	36.3
CENTER CITY	45.9	76.1
SUBURBS	13.5	12.1

26. US West's comments do nothing to alter my earlier conclusions. I have documented the underrepresentation of low income and minority areas in detail with respect to Denver in my two previous affidavits. US West's attachment for other cities shows, for example that in both Minneapolis/St. Paul and Portland, for of the five lowest income exchanges are not served. Focusing on the center cities, in both instances, the three lowest income exchanges are not served. In both cases, this represents over 100,000 people.
27. GTE's applications present a severe data problem. Wire centers are identified, but their relationship to the overall service territory and census tract data is extremely difficult to ascertain. GTE also resorts to statewide comparisons which have been shown to be misleading in the case of PacTel.

STATE OF MARYLAND

)

) SS

COUNTY OF MONTGOMERY

)

Mark N. Cooper
Mark N. Cooper

Subscribed and sworn to before me this 26th day of July, 1994.

Sharyl Wignar
Notary Public

My Commission Expires July 1, 1997

CERTIFICATE OF SERVICE

I, Anthony Wright, hereby certify that I have this 27th day of July, 1994, mailed by first class United States mail, postage prepaid, a copy of the Reply Comments of CME et al. regarding Petition for Rulemaking and Petition for Relief in Section 214 Video Dialtone Application Process, RM 8491 to the following:

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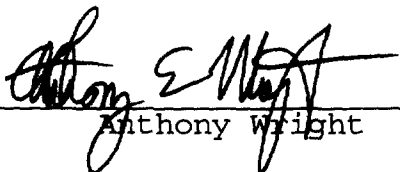
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